volition, and in the absence of the parties when it considered the preliminary ruling in Industrial Court Case No. 148 of 1977 in which the same A.B. Gomez was involved. I do not think this allegation is correct at all as it is clearly set out in the award (Exhibit P8) that the Industrial Court came to its decision after examining the various documents submitted by Encik Gomez himself. In coming to its conclusion the Industrial Court also took note of the observations of the presiding Chairman in the Industrial Court Case No. 148 of 1977. Since the preliminary ruling in Industrial Court Case No. 148 of 1977 was a public document and was related to the same question the Industrial Court in this case was perfectly entitled to look at it.

The Industrial Court has made its finding and it is trite law now that where the Industrial Court has decided on a question and while doing so it has not committed any errors affecting jurisdiction it was as much entitled to decide that question wrongly as it was to decide it rightly. In proceedings of this nature therefore the court is not required to go into the merits of the award and the duty of the court is only to find if the decision challenged was made without or in excess of jurisdiction. — See *Rex* v. *Northumberland Compensation Appeal Tribunal.*(2) *Certiorari* will not issue as a cloak of appeal in disguise.

The application is therefore dismissed with costs.

Application dismissed.

Solicitors: *K. Chandran & Co.; D.P. Xavier.*

LIAN KEOW SDN. BHD. v. C. PARAMJOTHY & ANOR.

[O.C.J. (Yusof Abdul Rashid J.) August 24, 1981]
[Johore Bahru — Civil Suit No. 270 of 1981]

Practice and Procedure — Anton Piller Order — Action for declaration that plaintiffs were beneficial owners of land and that defendant was holding land in trust for the plaintiffs — Application ex parte to authorise plaintiffs to enter premises of defendant and to take into custody documents which were essential evidence in action allowed.

In this case the plaintiffs sought a declaration that they were beneficial owners of a piece of land in Johore Bahru and that the first defendant was holding the said land in trust for the benefit of the plaintiffs. The plaintiffs applied *ex parte* for an *"Anton Piller"* order to authorise the plaintiff's representatives to enter the premises of the first defendant and to take into custody those documents which were essential evidence in the action.

Held, allowing the plaintiffs' application: in this case as the plaintiffs had proved a strong *prima facie* case against the first defendant that he held the said land in trust for the plaintiffs, that there was a serious danger of the first defendant destroying the trust deed and files relating to the said land and that the first defendant was in possession of such trust deed and files, the court would issue the order applied for.

[Editorial Note: See article "The 'Anton Piller' Order" [1982] 1 M.L.J. vi.]

Cases referred to:-

(1) *Anton Piller Kg.* v. *Manufacturing Processes Ltd. & Ors.* [1976] 2 W.L.R. 162.

(2) *Yousif* v. *Salama* [1980] 3 All E.R. 405.

(3) *Rank Film Distributors Ltd. & Ors.* v. *Video Information Centre & Ors.* [1981] 2 W.L.R. 668; [1981] 2 All E.R. 76.

CIVIL SUIT.

T. Thomas for the plaintiffs.

Yusof Abdul Rashid J.: The plaintiffs through the Official Receiver of Malaysia who has been appointed by the court as liquidator of the plaintiffs which are in the process of being wound-up, filed a writ seeking, *inter alia,* for a declaration that they are the beneficial owners of a piece of land held under Grant 6705 Lot 2084 in the Mukim of Tebrau in the District of Johore Bahru (the "said land") and that the first defendant is holding the said land in trust for the benefit of the plaintiffs. To prevent the destruction of the Trust Deed and the relevant files relating to the purchase of the said land from the former proprietors thereof, the plaintiffs applied to court for the custody of all those documents relevant to the action instituted in court which were believed to be in the custody of the first defendant. However, such application could not possibly be made *inter partes* for fear that the first defendant might destroy or conceal them to defeat the ends of justice. As such, the plaintiffs applied *ex parte* for an *"Anton Piller"* order to authorise the plaintiffs' representatives to enter the premises of the first defendant and to take into custody those documents which are essential evidence in the action.

The application was supported by an affidavit deposed by the Official Receiver Malaysia wherein it was disclosed that the first defendant had admitted to one, P.C. Dowson, the Assistant Registrar General in the Official Receiver's Office in Hong Kong that though he (the first defendant) was the registered proprietor of the said land, he was in fact holding it in trust for an unidentified company in the Mosbert Group of which the plaintiffs were one of them. From the plaintiffs' records it was disclosed that the plaintiffs were the beneficial owners of the said land though the first defendant was the registered proprietor thereof. The first defendant had affirmed in an affidavit, attached to the supporting affidavit of the Official Receiver Malaysia, that he was the registered proprietor of certain other pieces of land in the Mukim of Pulai Johore Bahru but in fact he was holding them in trust for other companies in the Mosbert Group. Exhibited to the supporting affidavit was a letter written by the first respondent to one, Ng Kong Yeam, admitting that he was holding the said land in trust. It was also admitted that a Trust Deed was executed in relation to the said land.

It has come to my attention that in relation to the said land, the first defendant, in breach of the said trust, had entered into a Sale and Purchase Agreement with one Ng Kam Loon on January 26, 1980 purporting to sell the said land for $120,000 for which the first defendant had accepted a sum of $12,000 as deposit and part payment towards the purchase price of the said land. The sale could not be completed since the plaintiffs had entered a caveat against the said land to protect their interests therein. On record, it was revealed that the first defendant by an Originating Motion No. 15 of 1981 had applied to the Johore Bahru High Court for an order to have

the said caveat removed in order to effect the sale of the said land.

On the evidence before me I was satisfied that though the first defendant was the registered proprietor of the said land, he was holding it in trust for the plaintiffs. I was also satisfied that in breach of the said trust the first defendant had entered into a Sale and Purchase Agreement to dispose of the said land. It was also established that the first defendant was in possession of a file dealing with the purchase of the said land from the previous proprietor and had executed a Trust Deed in relation to the said land. With these facts in mind I dealt with the application of the plaintiffs for an "*Anton Piller*" order. I had no doubt at all that under section 233(1) of the Companies Act 1965, the Official Receiver Malaysia was entitled to take into custody or control all properties to which the plaintiffs were or appeared to be entitled and under section 277(5) of the said Act, the Official Receiver Malaysia was at liberty to apply to court for an order that the first defendant as trustee regarding the said land to deliver, convey or surrender all books and papers in his possession to the Official Receiver Malaysia and to which the plaintiffs were *prima facie* entitled to.

To recover the Trust Deed and relevant file in relation to the said land from the first defendant, the plaintiffs had applied for an "*Anton Piller*" order and in considering the application I had to satisfy myself whether or not the circumstances existing at the time of application would justify me in granting such order.

It had been said in the English Court of Appeal case of *Anton Piller Kg.* v. *Manufacturing Processes Ltd. & Ors.*[1] that in most exceptional circumstances the court has an inherent jurisdiction to issue such an order. In that case the defendants were the United Kingdom agents of the plaintiffs, German manufacturers of frequency converters for computers. The plaintiffs claimed that the defendants were in secret communication with other German manufacturers and were giving them confidential information about the plaintiffs' power units and details of a new converter, the disclosure of which could be most damaging to the plaintiffs. In order to prevent the disposal by the defendants, before discovery in an action, of documents in their possession relating to the plaintiffs' machines or designs, the plaintiffs applied *ex parte* for an interim injunction to restrain the defendants from infringing their copyrights and disclosing confidential information and for an order for permission to enter the defendants' premises to inspect all such documents and to remove them into the plaintiffs' solicitors' custody. On the plaintiffs' undertaking to issue a writ forthwith, Brightman J. granted the interim injunction but refused to order inspection or removal of documents.

On the plaintiffs' *ex parte* appeal, which was heard in chambers with judgments later in open court, the English Court of Appeal held that in most exceptional circumstances, where plaintiffs had a very strong *prima facie* case, actual or potential damage to them was very serious and there was clear evidence the defendants possessed vital material which they might destroy or dispose of so as to defeat the ends of justice before any application *inter partes* could be made, *the court had inherent jurisdiction* to order defendants to "permit" plaintiffs' representatives to enter defendants' premises to inspect and remove such material; and that in the very exceptional circumstances the court was justified in making the order sought on the plaintiffs' *ex parte* application.

Though the English Court of Appeal case of "*Anton Piller*" dealt with matters relating to copyright, the jurisdiction to issue such an order was extended to other matters in the English Court of Appeal case of *Yousif* v. *Salama.*[2] In the latter case the plaintiff purchased goods for the defendants to resell under an agreement whereby the defendants were to pay the plaintiff commission for the goods supplied. For some years transactions took place and commission accrued to the plaintiff but was not paid. The plaintiff visited the defendants' office where he saw the accounts showing the amount of commission due to him. The plaintiffs then issued a writ claiming the amount owed and, fearing that the defendants might destroy the two files containing the accounts and a diary which contained details of the transactions, applied for an *Anton Piller* order permitting him to enter the defendants' premises to search and locate the files and diary and remove them to the custody of his solicitor. The English Court of Appeal, in that case, held that —

> "The court had a discretion to grant an Anton Piller order to enable the preservation of a document which did not itself form the subject matter of the action, where (per Lord Denning MR) the document was the best possible evidence and the plaintiff genuinely feared that the defendant would destroy it prior to the hearing of the action, or (per Donaldson LJ) there was a very clear *prima facie* case leading the court to fear that the defendant would conceal or destroy essential evidence and that to do so would deprive the plaintiff of any evidence on which to put forward his claim and so frustrate the process of justice, or (per Brightman LJ) there was prima facie evidence that essential documents were at risk. . . ."

The House of Lords had the opportunity of deliberating on the jurisdiction to issue *Anton Piller* order when the House dealt with the case of *Rank Film Distributors Ltd. & Ors.* v. *Video Information Centre & Ors.*[3] In that case the House of Lords held that "in respect of the orders requiring the defendants to allow access to premises for the purposes of looking for illicit copy films and to allow their being removed to safe custody, there was jurisdiction to make those orders. . .".

Thus, in most exceptional circumstances, the court has jurisdiction to order a defendant to permit the plaintiffs' representatives to enter defendant's premises to inspect and remove vital material which the defendant might destroy or dispose of so as to defeat the ends of justice before an *inter partes* application for an injunction could be made.

The order is for the first defendant to permit the plaintiffs' representatives to enter the office of the first defendant, who has the right to refuse to allow the plaintiffs' representatives to enter, inspect the relevant files, and to take into their custody the relevant Trust Deed. In the event of the first defendant refusing permission to the plaintiffs' representatives

to enter the premises, the plaintiffs may then bring it to the notice of the court. Should it be proved that the refusal was unreasonable, appropriate action might be taken against the first defendant, even to the extent of committing him. By the order, the first defendant is put in peril if he chooses to refuse permission and such refusal would also occasion adverse inferences being drawn against him.

Since I was satisfied that the plaintiffs had proved a strong *prima facie* case against the first defendant that he held the said land in trust for the plaintiffs, that there was indeed a serious danger of the first defendant destroying the Trust Deed and files relating to the said land and that the first defendant was in possession of such Trust Deed and files, I issued the order accordingly.

Application allowed.

Solicitors: *Skrine & Co.*

KOK EK CHOOI v. CHEAH SOON NEOH & ANOR.

[O.C.J. (Arulanandom J.) March 13, 1978; May 3 & November 8, 1979; January 7 & April 10, 1980; June 2 & August 24, 1981]

[Penang — Civil Suit No. 787 of 1976]

Contract — Specific performance — Claim to enforce subdivision of land.

Statute of Frauds — Memorandum in writing — Collateral oral agreements admissible to construe memorandum — Statute of Frauds 1677, s. 4 (U.K.) — Law of Property Act, 1925, s. 40(1).

The plaintiff claimed for specific performance of an agreement made between the plaintiff and the defendants on June 11, 1956 for the transfer of the defendants' two-eighths undivided shares in Lots 1285, 1286, 1288 and 1290, Mukim 14, Province Wellesley Central, to the plaintiff in consideration of the plaintiff's undertaking to surrender his six-eighths undivided shares in Lots No. 1287 and 1289 to the defendants absolutely. The agreement was that the plaintiff was to pay for and own three-fourths of the land and the defendants were to jointly own one-fourth of the land. At first the land was worked jointly but as the arrangement was not satisfactory it was decided to sub-divide the land. The object and purpose of this subdivision was in order that each party could become sole proprietor of his share of the land originally purchased, go into possession immediately and plant and develop his land and reap the harvest . It was agreed between the parties that once subdivision was completed and new titles were issued the parties would sign the necessary cross transfer of their respective undivided portions to regularize their sole proprietorship.

The defendants averred that the sole purpose of subdivision was for the purpose of cultivation and that each party was to retain his undivided interest in the different portions of the land even after subdivision and the issue of new titles. In their amended defence, they invoked section 4 of the Statute of Frauds.

Held, allowing the plaintiff's claim: (1) the parties decided to subdivide the land to get sole ownership of their portions according to their undivided shares. Subdivision was not solely for the purpose of cultivation for if it were so they would have had to share the costs and expenses of developing the separate portion and share the profits in the proportion of their undivided shares. To put any other construction on the signing on the plans and all the surrounding circumstances would be to indulge in ostrichism;

(2) collateral oral agreements have been admitted to explain and construe the note or memorandum; Even if it is not sufficient to meet the requirement by Statute that the agreement must be evidenced in writing, the fact that the plaintiff had partly performed the contract in the expectation that the defendant would perform the rest of the contract provides an equitable remedy for the plaintiff and would not enable the defendant to escape from the obligations of his contract upon the strength of the statute but the court will order specific performance of the contract;

(3) no court will allow the Statute of Frauds to be used as an instrument of fraud. Hence the Statute of Frauds will be of no avail to the defence.

Cases referred to:-

(1) *Jacobs* v. *Revell* [1900] 2 Ch. 858.

(2) *In re Puckett & Smith's Contract* [1902] 2 Ch. 258.

CIVIL SUIT.

Lim Kim Chuan for the plaintiff.

S. Thillaimuthu (*Lim Teong Chuan* with him) for the defendants.

Arulanandom J.: This was a claim by the plaintiff for specific performance of an agreement made between the plaintiff and the defendants on or about June 11, 1956 for the transfer of the defendants' two-eighths undivided shares in Lots 1285, 1286, 1288 and 1290, Mukim 14, Province Wellesley Central, to the plaintiff in consideration of the plaintiff's undertaking to surrender his six-eighths undivided shares in Lots No. 1287 and 1289 to the defendants absolutely.

The defendants denied that there was any such agreement and although the counterclaim was withdrawn at the trial, the defendants in their pleadings by way of counterclaim alleged that the plaintiff had since the year 1973 unjustly kept the income and profits from the portions of the said land cultivated by him and had failed to distribute to the defendants their fair share of the same. Wherefore they counterclaimed for:—

(i) an Order that the plaintiff do render true and proper accounts of all the incomes and profits from the land bearing Lots Nos. 1285, 1286, 1288 and 1289, Mukim 14 Province Wellesley Central since the year 1973, and

(ii) an Order that the plaintiff pay to the defendants two-eighths share of the total income and profits so found to be due from the said lots.

At the commencement of the hearing on November 8, 1979 the defendants applied to amend the defence by the addition of paragraph 12A:

"There is no or sufficient memorandum in writing of the alleged agreement and the defendant will rely on section 4 of the Statute of Frauds."

As plaintiff's counsel had no objections the amendment was allowed.

The brief history of the matter is as follows: Some time in December 1955 the plaintiff and the defendants (who were husband and wife) who knew each other well together purchased Lot No. 616(3) Mukim 14 Province Wellesley Central at $530 per acre. The agreement was that plaintiff was to pay for and own three-fourths of the land and defendants were to jointly own one-fourth of the land. This is admitted.

At first the land was worked jointly but as, according to the defendants' son, the arrangement was